

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE
RECEIVED

JUN 22 1992

Federal Communications Commission
Office of the Secretary

In the Matter of

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

GC Docket No. 92-52

RM-7739
RM-7740
RM-7741

REPLY COMMENTS

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding. NABOB opposes the comments of the parties calling for elimination of the Commission's integration criterion and submits that modification of the Commission's comparative criteria is not required. A substantial change in the Commission's comparative criteria could undermine the decision of the U.S. Supreme Court in the Metro Broadcasting¹ case. In addition, a change in the comparative criteria would be impermissible if it would change the weight given the minority ownership preference or change the manner in which that preference is applied. In support of its Comments NABOB submits the following:

1. In the Notice of Proposed Rulemaking ("NPRM") in this proceeding, the Commission noted that in Bechtel v. FCC, No. 91-1112 (D. C. Cir. 1992), the U.S. Court of Appeals criticized the Commission for failing to consider whether changes in factual or

¹Metro Broadcasting Inc. v. FCC, 110 S. Ct. 2997 (1990).

No. of Copies rec'd
List A B C D E

0+9

legal circumstances since adoption of the 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) ("1965 Policy Statement") imposed an obligation on the Commission to reexamine the policies adopted in the 1965 Policy Statement.

2. NABOB recognizes that the Commission is obligated as a result of the Bechtel decision to determine whether the 1965 Policy Statement should be changed. However, the Court in Bechtel did not require the Commission to make any changes in the comparative hearing criteria. NABOB submits that a review of the 1965 Policy Statement does not require any significant changes in the comparative criteria.

3. In the NPRM the Commission noted that the Court in Bechtel had stated: "The Commission has not spelled out why an owner/manager will be more sensitive to community needs than an owner who hires a professional manager." NPRM, citing Slip Op. at 12 (emphasis in the original). The Commission implies that the Court may have raised a valid issue here. However, there are several points which the Court did not consider.

4. The Commission in the comparative hearing context is attempting to obtain evidence concerning the program service an applicant may provide to its proposed service area. The Commission routinely requires proposed integrated principals to be cross-examined in front of an Administrative Law Judge in order to allow the Judge to assess whether the principals of the applicant can be expected to meet the commitments they have made in their application and supporting documents. The integrated principals'

testimony is transcribed and becomes a part of the record for the Review Board, the Commission, the Court of Appeals and even the Supreme Court to ultimately review. This process provides a very full factual record for determining the intentions of the integrated principals with respect to serving the public.

5. When an applicant asserts, in effect, "I will not work at the station, but I will hire someone who will serve the community," that applicant removes from the process any ability for the Commission or any reviewing court to assess whether the person who will actually run the station can be counted upon to serve the community.

6. Obviously, this is not to say that professional managers are unable to serve the community. Rather, this suggests that a party which does not intend to be at the station everyday to assure that the community is properly served should not be preferred in a hearing where the sole purpose is to chose between several qualified applicants. There is as much reason today as there was in 1965 to give a preference to an applicant which says, in effect, "I am so committed to serving the public in the manner the Commission desires that I will give up all other employment to work full time at the station to accomplish this."

7. The Commission also notes in the NPRM that the integration criterion may lead applicants to propose integration proposals which may not be realistic to effectuate. However, this is true regardless of the comparative criteria. Any comparative criteria containing a system of preferences will cause eager

entrepreneurs and aggressive attorneys to find ways to fit otherwise un-preferred applicants into the preferred criteria. This is no reason to eliminate the integration criterion from the group of comparative criteria. Rather, this suggests that re-imposition of the three-year trafficking rule may be appropriate. In this manner, a successful applicant in a comparative proceeding will know that, if it submits an integration proposal it does not intend to effectuate, it will be in danger of losing its construction permit or license.

8. Further, the integration criterion must be retained because it is a principal underpinning for the minority preference criterion. From the TV 9² decision through the Metro Broadcasting decision, the courts have held that, where it can be shown that minorities will have a significant role in the day-to-day operations of a broadcast station, it is appropriate to accord such involvement a comparative preference.

9. Should the Commission eliminate the integration criteria the Commission runs the risk of eliminating an important basis for maintaining the minority preference. Unless the minority ownership preference is limited to integrated minority owners, the Commission will find itself inundated with nonminority owners asserting that they will hire minority managers and seeking to receive the same minority preference which would be awarded to minority owned applicants.

²TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

10. Moreover, the minority ownership credit has never been a separate preference. It has only been treated as an "enhancement" to the integration credit. Therefore, the Commission may be presented with nonminority applicants arguing that, without an integration criterion, no credit should be awarded for minority ownership or for minority managers.

11. The Commission's proposal therefore, could lead to the end of any credit being given for minority ownership in future comparative proceedings. NABOB hopes that the Commission is not attempting through this indirect approach to achieve this end. However, whether intentionally or inadvertently, the Commission is headed in exactly that direction.

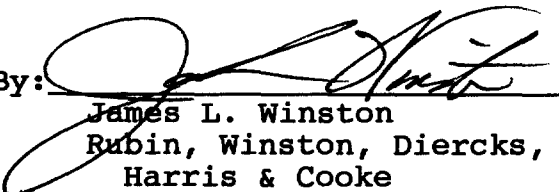
12. Finally, and most importantly, because the proposed change would undermine the minority ownership credit, the Commission is barred from expending funds to change that policy. See Act of October 28, 1991, Pub. L. 102-140 and preceding annual appropriations legislation dating back to 1987. The Commission cannot expend funds to accomplish indirectly that which it could not do directly. If the Commission eliminates the integration criterion, it will eliminate the current minority ownership preference, because that preference is only given to integrated minority owners. Replacing that preference with a minority preference for nonintegrated minority owners is a change of policy which cannot be accomplished without prior Congressional approval.

CONCLUSION

NABOB submits that any substantial change in the integration criterion would amount to a change in the minority ownership preference and cannot be accomplished without prior Congressional approval. The Commission may neither change the integration criterion nor change the manner in which the various comparative criteria are implemented without Congressional approval, if the result would be to reduce the weight given to the minority ownership preference or reduce its impact when implemented. NABOB submits therefore, that no substantive changes can or should be made in the comparative hearing criteria.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BLACK
OWNED BROADCASTERS, INC.**

By: 
James L. Winston
Rubin, Winston, Diercks,
Harris & Cooke
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870

June 22, 1992